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Attorneys for Respondent.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. 520

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF FOR PETITIONER.

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Subject Index

	Page
Statement of the case	1
Argument	4
The respondent violated the Interstate Commerce Act by failing to maintain a reasonable or any rate applicable to the transportation within the United States of the shipments in issue	4
The respondent violated the Interstate Commerce Act by failing to charge a reasonable rate for the transportation within the United States of the shipments in issue	10
The decision of the court below denies to the Interstate Commerce Commission a jurisdiction which that Commission has regularly asserted and exercised for more than twenty years and is still asserting and exercising	12
The decision of the court below prevents the exercise by the Interstate Commerce Commission of any effective control over charges maintained or collected by railroads for the transportation within the United States of property moving in international commerce	14
Conclusion	19

Table of Authorities Cited

	Pages
Armour Packing Co. v. U. S., 209 U. S. 56, 81	9
Atlantic Fish Co. v. C. N. R., 148 I. C. C. 533	9, 12
Black Horse Tobacco Co. v. I. C. R. R. Co., 17 I. C. C. 588	12
Boston & Main R. Co. v. Hooker, 233 U. S. 97, 110	9
B. & O. S. W. R. R. Co. v. Settle, 260 U. S. 166	9
International Nickel Co. v. Director General, 66 I. C. C. 627	12
Charles B. Justice Co. v. Holton I. R. Co., 153 I. C. C. 673	9, 12
Larrowe Milling Co. v. W. & L. E. R. R., 52 I. C. C. 145	12
L. & N. R. R. Co. v. Maxwell, 237 U. S. 94, 97	9
L. & N. R. Co. v. Sloss, Sheffield Co., 269 U. S. 217, 231	11
Monarch Paper Co. v. C. P. Ry. Co., 53 I. C. C. 620	12
News Syndicate Company v. N. Y. C., 275 U. S. 179	5, 11
Rub-No-More Co. v. Director General, 69 I. C. C. 23	12
San Diego Oil Products Corp. v. Holton I. R. Co., 164 I. C. C. 505	12

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STATEMENT OF THE CASE.

The complaint herein was filed to enforce payment of a reparation award by the Interstate Commerce Commission. The defendant had collected from the plaintiff at San Francisco, Calif., a rate of $1.33 per 100 lbs. upon three carloads of cow peas which the respondent, in conjunction with the Southern Pacific Railroad of Mexico, had transported under through bills of lading from Navojoa, Mexico to San Francisco. This joint through rate was named in a tariff filed with the Commission.

The complaint alleged and the answer did not deny that this rate of $1.33 was unjust and unreasonable to the extent that it exceeded 94¢ per 100 lbs., and that the Commission so found. (R. 3, 4.) The claimed defense is that the Commission was without jurisdiction. The only fact pleaded by respondent which now appears material is an allegation in an amendment to the answer (R. 5, 6) that respondent "maintained a rate applicable on cow peas, carloads, from the said international boundary line at Nogales, Ariz., to San Francisco, Calif., which rate would have been applicable for the transportation within the United States of the shipments mentioned in the complaint had the consignors or owners elected to consign the same to said international boundary line and had thence reshipped said cow peas from said international boundary line to San Francisco, and that the Interstate Commerce Commission has not at any time found said local rate from the international boundary at Nogales, Ariz., to San Francisco, Calif., to be or to have been unjust or unreasonable, or otherwise in violation of law."

The trial court found that the respondent maintained and published a rate of $1.14½ per 100 lbs. on carload shipments of cow peas originating at Nogales, Ariz., and destined to San Francisco; that this rate was applicable to carload shipments of cow peas originating at the point where the lines of the Southern Pacific Railroad Company of Mexico and respondent touch the international boundary line at Nogales, Ariz., and destined to San Fran-

cisco; and was likewise applicable upon carload shipments of cow peas loaded into cars at any point upon or adjacent to the boundary line within the limits of the respondent's railroad yards at Nogales, Ariz., and destined to San Francisco; that the shipments in issue could have been transported by other means than by railroad to a point at the boundary line and there loaded into cars for movement over respondent's line; that the rate applicable upon shipments from such point upon the boundary line to San Francisco was the said rate of $1.14½ per 100 lbs.; that said rate of $1.14½ was reasonable and lawful for application upon carload shipments of cow peas from Nogales, Ariz., including such shipments as might be loaded at any place within the railroad yard limits at that point, destined to San Francisco; and that the Interstate Commerce Commission had made no finding and had had no evidence before it regarding the reasonableness of said rate of $1.14½. The trial court concluded as a matter of law that the Commission was without jurisdiction. (R. 66 to 69.) On appeal the judgment was affirmed, the Appellate Court concluding that the facts, as stated above, did not constitute any violation of the Interstate Commerce Act by the respondent. (R. 81.)

ARGUMENT.

THE RESPONDENT VIOLATED THE INTERSTATE COMMERCE ACT BY FAILING TO MAINTAIN A REASONABLE OR ANY RATE APPLICABLE TO THE TRANSPORTATION WITHIN THE UNITED STATES OF THE SHIPMENTS IN ISSUE.

As premises upon which argument in this brief will be predicated we state the following propositions of law:

1. The Interstate Commerce Act was applicable to the transportation within the United States of the shipments in issue. Para. (1) and (2), Sec. 1.

2. It is the duty of every common carrier by railroad to publish and file with the Interstate Commerce Commission a reasonable rate applicable to transportation within the United States of all property transported, which originates in a foreign country and is destined to a point in the United States. Para. (1) and (7), Sec. 6; Para. (5), Sec. 1.

3. A common carrier by railroad which transports within the United States property which originates in a foreign country and is destined to a point in the United States, must charge and collect for the transportation service within the United States the identical rate which it has published and filed in fulfillment of the duty above stated, and any rate which the carrier *may* collect for such service it *must* collect for that service. Para. (7), Sec. 6.

4. It is unlawful for a common carrier by railroad to collect any unjust or unreasonable

charge for a transportation service rendered within the United States in the carriage of property originating in a foreign country and destined to a point in the United States. Para. (5), Sec. 1.

The pertinent provisions of the Act are quoted in appendix to petition for writ of certiorari and brief in support thereof. No argument is here offered in support of these propositions of law because we believe them to be self evident from the terms of the statute.

In stating these propositions, as well as in all of the argument which follows, we purposely disregard exceptions in the Act, not pertinent here, which authorize services at free or reduced rates for the United States, state or municipal governments, etc. Save those provisions, we assert the foregoing propositions of law to be absolute and subject to no exceptions whatsoever.

In *News Syndicate Company v. N. Y. C.*, 275 U. S. 179, the following questions of law were certified to this Court:

"1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?

2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

3. When the Interstate Commerce Commission had made such an order against the United States carrier alone for the payment of damages arising from its finding of the unreasonableness of such published joint through rate, can a suit thereon, under section 16 of the Interstate Commerce Act, be maintained solely against the United States carrier?

4. Did the District Court err in sustaining the demurrer to the said petition?"

We quote the following verbatim from the decision of this Court:

"Question 1 is answered 'Yes, for the ascertainment of damages.'

Question 2 is answered 'Yes.'

Question 3 is answered 'Yes.'
Question 4 is not answered."

These questions and answers, standing alone, afford a complete and affirmative answer to the Commission's jurisdiction in this case. However, this Court's conclusions in the case cited were reached in the light of the fact that the carriers there had violated the Interstate Commerce Act by failing to make or publish any rate applicable to that portion of the transportation there involved which was within the United States. The allegation in the amendment to the answer that respondent "maintained a rate applicable on cow peas, carloads, from the said international boundary line at Nogales, Ariz., to San Francisco, Calif., which rate would have been applicable for the transportation within the United States of the shipments mentioned in the complaint had the consignors or owners elected to consign the same to said international boundary line and had thence reshipped said cow peas from said international boundary line to San Francisco," was apparently intended to differentiate the facts in the case at bar from the facts in the *News Syndicate Co.* case. If so intended, the allegation fails of its purpose in view of the fact that the respondent had engaged in the transportation within the United States of property moving on through bills of lading from a point in a foreign country to a destination in the United States, and having engaged in such transportation, it was the respondent's duty to maintain a reason-

able rate applicable thereto. The respondent did not comply fully with its obligations in this respect merely by maintaining a rate which "would have been applicable" if the facts had been different. The respondent's duty was to maintain a rate which *was* applicable to the transportation within the United States of these very shipments. The trial court did not find that the respondent had maintained any rate which was applicable to the transportation within the United States of the shipments in issue, but found that the respondent maintained a rate applicable to the transportation within the United States of various other classes of shipments from the international boundary line to San Francisco. (R. 66 to 69.) Nor does the decision of the Court below on appeal contain any expression to the effect that the respondent had maintained a rate which was applicable to the transportation within the United States of the shipments in issue. Although the respondent maintained a rate on cow peas from the international boundary line to San Francisco which, it may be assumed for the purposes of this case, was applicable to the transportation within the Untied States of the various classes of shipments described in the amendment to the answer and in the findings of the trial court, that rate was not applicable to the transportation within the United States of the shipments in issue, because the respondent had filed with the Interstate Commerce Commission a joint through rate via the route of movement from Navojoa, Mexico to San Francisco, and where a joint through rate is estab-

lished no other rate can be applied. *B. & O. S. W. R. R. Co. v. Settle,* 260 U. S. 166. The Interstate Commerce Commission holds that this rule is applicable to international joint through rates of the nature here involved. *Charles B. Justice Co. v. H. I. R. Co.,* 153 I. C. C. 673; *Atlantic Fish Co. v. C. N. R.,* 148 I. C. C. 533. If respondent's argument to the contrary is sound, let us say that on the same date two identical shipments of cow peas are made on through bills of lading from Navojoa, Mex., one consigned to X Co. at San Francisco, another consigned to Y Co. at San Francisco. There is a through rate published and filed with the Commission for that transportation from Navojoa to San Francisco, but nevertheless, as we understand respondent's argument, X Co. might pay the through rate, Y Co. might pay the sum of the rates from and to the international boundary line, and both transactions would be entirely lawful. The respondent thus argues that there may be two rates in effect at the same time for an identical transportation service, either one of which may be lawfully charged, thereby defeating what this Court has repeatedly stated to be the central and controlling purpose of the Act, that there shall be only one rate for similar carriage of freight, which rate must be charged.

Armour Packing Co. v. U. S., 209 U. S. 56, 81;

Boston & Maine R. Co. v. Hooker, 233 U. S. 97, 110;

L. & N. R. R. Co. v. Maxwell, 237 U. S. 94, 97.

THE RESPONDENT VIOLATED THE INTERSTATE COMMERCE ACT BY FAILING TO CHARGE A REASONABLE RATE FOR THE TRANSPORTATION WITHIN THE UNITED STATES OF THE SHIPMENTS IN ISSUE.

It is admitted that the through charge collected at San Francisco for the transportation from Navojoa, Mex., was unreasonable. This charge included in it a transportation service within the United States. Para. (5) of Sec. 1 of the Act was applicable to that service and required that "all charges made for any service rendered or to be rendered in the transportation of passengers or property * * * or in connection therewith shall be just and reasonable." When a carrier subject to the Act has collected a charge which includes in it a service which is subject to the Act, there must be some practicable method of determining whether that charge is reasonable. The requirements of the Act are directed to the "charges made" and surely the Commission, in seeking to determine whether the "charges made" are in accordance with the requirements of the Act, has jurisdiction to inquire into and determine the reasonableness of the identical charge which was collected. True, since a joint through rate is a unit in itself, necessarily the Commission's inquiry and determination must be directed to the entire charge, which includes in it transportation both within and without the boundaries of the United States. This Court held in the *News Syndicate Co.* case, supra, that the Commission may make such inquiry and determination in awarding damages for violation of the Act. The measure of damages for the exaction of an un-

reasonable charge is the difference between the rate collected and the rate found to be reasonable, and the claimant's right to reparation does not depend upon the amounts retained by carriers pursuant to agreed divisions. *L. & N. R. Co. v. Sloss, Sheffield Co.*, 269 U. S. 217, 231. This rule is applicable to charges collected under an international joint through rate. *News Syndicate Co. v. N. Y. C. R. R. Co.*, supra. If the respondent's contentions, as we understand them, are sound, the result is that a carrier operating within the United States, by collecting a joint through rate for service which includes transportation within the United States subject to the Act, thereby creates a condition which deprives the Interstate Commerce Commission of any power to determine whether the charges made are or are not reasonable. Stated otherwise, although the Act requires that all charges made by a railroad for transportation within the United States of property originating in a foreign country and destined to a point in the United States shall be just and reasonable, the respondent contends that a carrier within the United States may preclude any determination of the reasonableness of the charge made by the simple expedient of obscuring it through the collection of an international joint through rate.

THE DECISION OF THE COURT BELOW DENIES TO THE INTERSTATE COMMERCE COMMISSION A JURISDICTION WHICH THAT COMMISSION HAS REGULARLY ASSERTED AND EXERCISED FOR MORE THAN TWENTY YEARS AND IS STILL ASSERTING AND EXERCISING.

The Commission, in decisions dating at least from February 17, 1910 and thenceforth, without exception has asserted and exercised the power which it has asserted and exercised in this case.

Black Horse Tobacco Co. v. I. C. R. R. Co., 17 I. C. C. 588;

Larrowe Milling Co. v. W. & L. E. R. R., 52 I. C. C. 145;

Monarch Paper Co. v. C. P. Ry. Co., 53 I. C. C. 620;

International Nickel Co. v. Director General, 66 I. C. C. 627;

Rub-No-More Co. v. Director General, 69 I. C. C. 23.

Save the case at bar, we find no reported decision in which any Court has ever held that the Commission had exceeded its powers in so doing. Further, the Commission holds that under the decision of this Court in the *News Syndicate Co.* case, it has jurisdiction to award reparation in cases of the kind presented.

Atlantic Fish Co. v. C. N. R., 148 I. C. C. 533;

Charles B. Justice Co. v. Holton I. R. Co., 153 I. C. C. 673;

San Diego Oil Products Corp. v. Holton I. R. Co., 164 I. C. C. 505.

The decision here under review is predicated upon the conclusion of the Court below that the respondent had not violated the Interstate Commerce Act in any respect whatever. (R. 81.) The respondent has argued that your petitioner and all shippers are given an opportunity to secure a reasonable rate for transportation within the United States so long as the carriers maintain a reasonable rate from the international boundary line to the destination in the United States. In the *News Syndicate Co.* case this Court held that the carriers within the United States were bound to accord shippers that opportunity, but the Court did not say or infer that the obligations of the carriers within the United States ended there. It is here we believe that the Court below fell into its outstanding error in interpreting the decision in the *News Syndicate Co.* case as holding that the sum total of the obligations of the carriers in the United States is to maintain lawful rates to and from the international boundary line without regard to whether the rates actually charged are lawful. The Interstate Commerce Act goes further than merely to require that the carriers in the United States shall afford shippers an opportunity to secure lawful rates. The Act places the burden squarely upon the carriers themselves of seeing to it that in every case the charges actually collected are lawful, regardless of how many opportunities the shipper may have had to secure lawful rates. Para. 5, Sec. 1, requires not only that the carriers shall maintain reasonable charges for services "to be rendered" but also requires that charges shall be

reasonable for services "rendered." A carrier may comply with its obligation to maintain lawful rates for services "to be rendered" merely by according shippers an opportunity to secure lawful rates, but the carrier has not fulfilled its obligation to make a lawful charge for services "rendered" unless the charge actually made for that service is lawful.

THE DECISION OF THE COURT BELOW PREVENTS THE EXERCISE BY THE INTERSTATE COMMERCE COMMISSION OF ANY EFFECTIVE CONTROL OVER CHARGES MAINTAINED OR COLLECTED BY RAILROADS FOR THE TRANSPORTATION WITHIN THE UNITED STATES OF PROPERTY MOVING IN INTERNATIONAL COMMERCE.

The duties of a carrier subject to the Act are the same with regard to transportation within the United States of property originating in a foreign country and destined to a point in the United States as they are with regard to transportation within the United States of property originating in the United States and destined to a point in a foreign country, or with regard to transportation within the United States of property originating in the United States and moving through a foreign country to a destination in the United States. The scope of the Act is defined in Para. (1) and (2) of Sec. 1. Para. (1) and (7) of Sec. 6, requiring railroads to publish and file their rates, and to collect the rates so published and filed, are applicable only to the character of commerce defined in Para. (1) and (2) of Sec. 1. Similarly Para. (5) of Sec. 1, requiring that all charges made shall be just and

reasonable, is applicable only to the character of commerce defined in Para. (1) and (2) of Sec. 1. Likewise Sec. 2, prohibiting discrimination and Para. (1) of Sec. 3 prohibiting undue preference or prejudice, are applicable only to the character of commerce defined in Para. (1) and (2) of Sec. 1. If it be said then that the maintenance or collection by a railroad in the United States of an unreasonable joint through rate, which includes in it transportation within the United States of property originating in a foreign country and destined to a point in the United States, does not constitute a violation of Para. (5) of Sec. 1 of the Act, as is held by the Court below, then obviously the maintenance or collection of such a joint through rate which was discriminatory, or which resulted in undue preference or prejudice, could not constitute a violation of Sec. 2 or Para. (1) of Sec. 3. Likewise, if the collection of such an unreasonable joint through rate does not constitute a violation of Para. (5) of Sec. 1, then the collection of an international joint through rate which was more or less than that named in tariffs filed with the Commission, could not constitute a violation of Para. (7) of Sec. 6. Therefore, if the Court below was correct in its conclusion that the collection by the respondent of an unreasonable joint through international rate which included in it transportation within the United States of property destined to a point in the United States and originating in a foreign country, did not constitute a violation of the Act, because of the fact that the respondent maintained

a lawful rate applicable to shipments from the international boundary line to the destination in the United States, the results may be illustrated as follows: First, railroads in the United States may lawfully join with Canadian railroads in through rates from St. Louis to Montreal which are grossly prejudicial in comparison with rates from Chicago to Montreal. In such a situation, of what practical use would it be that the rates from Chicago and from St. Louis to the international boundary line might be entirely free from undue prejudice, if the rates actually charged were prejudicial? Second, railroads in the United States may lawfully join in through rates from Montreal to St. Louis on shipments consigned to X Co. with higher rates from Montreal to St. Louis on shipments consigned to Y Co. Of what use would it be that the rates from the international boundary line to St. Louis might be lawful in every respect if the rates actually charged to Y Co. were higher than the rates charged to X Co.? Third, the Commission may wish to fix minimum rates from Seattle, Wash., to Detroit, Mich., but will be unable to effectually exercise its powers in that direction because of the availability of routes from Seattle to Detroit which operate through Canada, inasmuch as joint through rates over such routes would be free from the requirements of the Act or the jurisdiction of the Commission. In such a case, of what practical use would it be that the rates from Seattle to the point where the shipments entered Canada and to Detroit from the point where

the shipments again entered the United States were entirely lawful if the carriers in the United States were nevertheless free to join in through rates from Seattle to Detroit, through Canada, which were free from the requirements of the Act? Fourth, railroads in the United States may join with carriers in foreign countries in secret joint through rates between points in foreign countries and points in the United States, inasmuch as these joint through rates would be free from the requirements of Para. 6 and 7 of Sec. 6 of the Act relative to publishing and filing rates with the Commission. Fifth, a railroad in the United States may lawfully join with carriers in Mexico in the establishment and filing with the Interstate Commerce Commission of a rate of $1.33 per 100 lbs. on cow peas from Navojoa to San Francisco, but on arrival in San Francisco the railroad may collect from the consignee either more or less than that amount, and the Interstate Commerce Commission would be powerless to do anything in the matter.

The foregoing illustrations were cited in brief in support of our petition herein. Brief of respondent in opposition to petition for writ of certiorari, at page 18, contends that "these illustrations all depend upon the erroneous view that the lower Court has held that an international through rate is wholly free from the restraints of Para. (5) of Sec. 1 of the Act; and the deduction, drawn from that assumption, that if that portion of the statute is not controlling, other sections are likewise without ap-

plication. The lower Court made no such decision." Since respondent says we were in error in these illustrations, we necessarily take it to be respondent's view that the maintenance or collection of a discriminatory joint through international rate would constitute a violation of Section 2 of the Act, notwithstanding the maintenance of a non-discriminatory rate between the international boundary line and the origin or destination point in the United States; that the maintenance or collection of a preferential or prejudicial joint through international rate would constitute a violation of Para. (1) of Sec. 3 of the Act, notwithstanding the maintenance of a rate, free from preference or prejudice, between the international boundary line and the origin or destination point in the United States; that the maintenance of a less than reasonable rate from a point in the United States through a foreign country to a destination in the United States would constitute a violation of Para. (5) of Sec. 1 of the Act, thus enabling the Commission to exercise its minimum rate powers, notwithstanding the maintenance of reasonable rates from the point of origin in the United States to the international boundary line and from the international boundary line to the destination in the United States. And yet the respondent argues, and construes the decision of the Court below as holding, that the maintenance and collection by the respondent of an unreasonably high joint through international rate was not a violation of Para. (5) of Sec. 1, because the respondent

maintained a reasonable rate from the international boundary line to the destination in the United States. This reasoning strikes us as enigmatic beyond comprehension.

The respondent says that the decision of the Court below should not be construed as holding that international joint through rates are entirely free from the restraints of Para. (5) of Sec. 1 of the Act. This paragraph does not require anything of any rates except that all charges made for any service rendered or to be rendered, within the scope of the Act, shall be just and reasonable. What restraints, then, does the respondent think are imposed upon joint through international rates by Para. (5) of Sec. 1, if the collection of an unreasonable joint through international rate does not constitute a violation of any provision of the Act, as is held by the Court below? If Para. (5) of Sec. 1 does not restrain the collection of an unreasonable joint through international rate, then what does it restrain with regard to such rates? The collection by a carrier in the United States of an unreasonable joint through international rate is either a violation of the Interstate Commerce Act or else those rates, when established, are entirely free from all of the provisions of the Interstate Commerce Act.

CONCLUSION.

Upon any one of the several grounds stated above, the decision of the Court below, predicated upon the

conclusion that the Act was not violated and therefore that the Interstate Commerce Commission was without jurisdiction, should be reversed.

Dated, San Francisco, California,
February 11, 1931.

Respectfully submitted,

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